

2012 WL 11922345 (Ill.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Illinois,
Nineteenth Judicial Circuit.
Lake County

Jerilyn TANAKA, Plaintiff,

v.

CONDELL MEDICAL CENTER; Advocate Condell Medical Center; Advocate
Health and Hospital, Corp.; Vina Maniquis, MD; Lana Goldman, MD; Meadows
Medical Group, Ltd.; and Infinity Healthcare Physicians, SC, Defendants.

No. 2010L1012.
October 10, 2012.

Plaintiff's Response to Defendants' Motion to Dismiss

O'Connor & Nakos, Ltd., One of Plaintiff's Attorneys, [Martin J. Lucas](#), 120 N. LaSalle Street, 35th Floor, Chicago, IL 60602, 312-546-8100, Attorney No.: 6207741.

ATTY. NO. 6207741

NOW COMES the Plaintiff, JERILYN TANAKA, by and through her attorneys, O'CONNOR & NAKOS, LTD.. and presents a brief in response to the Motions to Dismiss filed by all Defendants.

Short Statement of Facts

Jerilyn Tanaka was admitted to Condell Medical Center through its emergency department due to exacerbation of [chronic obstructive pulmonary disease](#) (Ex. A; Plaintiff's First Amended Complaint at Law). During that admission, she fell into respiratory distress. She was resuscitated but remained in a coma for several weeks (Ex. A; Plaintiff's First Amended Complaint at Law). After artificial life support was removed, she could not speak and suffered terrible jerking of her body (Ex. C; Deposition of John Tanaka; pp. 35-36). She regained the ability to move and regained the power of speech through rehabilitation at the Rehabilitation Institute of Chicago (Ex. B; deposition of Robert Tanaka; pp. 60-61).

She continued her rehabilitation with improvement in her physical movements as well as speech and cognition. She was discharged to her home where she did have home care assistance performed by a neighbor (Ex. C; Deposition of John Tanaka; pp. 42-43).

Several months after release from Condell, Plaintiff moved to Florida to live with her sister. She continued medical care with physicians in Florida (Ex. B; Deposition of Robert Tanaka; pp. 74-77). Medical records from Florida show ongoing problems with myoclonic jerks that affected her physical stability.

Plaintiff returned to Illinois at which time she was advised that residence in an assisted living facility would be beneficial (Ex. B; Deposition of Robert Tanaka; p. 82). She entered the Seasons in Glenview with the help of her sons Robert and John Tanaka. At that time, powers of attorney were prepared (Ex. A; Plaintiff's First Amended Complaint at Law).

Ms. Tanaka did sustain [anoxic brain injury](#) in November 2008. The injury caused myoclonic jerks which affect her movement and balance. It also affected her memory. There are times where short term and long term memory fail her (Ex. C; Deposition

of John Tanaka; p. 42). Nevertheless, she can understand conversations. After recovering from the coma, her communication skills did improve, and she could understand questions and give answers (Ex. C; Deposition of John Tanaka; p. 47). While her memory could be sporadic, she could hold a conversation (Ex. C; Deposition of John Tanaka; p. 48). Until 2012, she would attend and play the bingo games at the Seasons (Ex. B; Deposition of Robert Tanaka; p. 85).

ARGUMENT

Plaintiff filed a Complaint at Law alleging medical negligence against the Defendants. A First Amended Complaint at Law was filed to reflect that the Agent, Robert Tanaka, was pursuing the medical negligent claim. Defendants have filed Motions to Dismiss alleging that Plaintiff is not competent to pursue the lawsuit.

Defendants' Motion to Dismiss is premised on its *admission* that Jerilyn Tanaka is under a legal disability. More importantly, the motion is premised on the *assertion* that she was under a legal disability in July 2009 when the power of attorney was signed. Plaintiff has a right to pursue a cause of action through a guardianship estate wherein a court of competent jurisdiction has appointed a guardian. 755 ILCS 5/11 *et seq.* But the Plaintiff also has a right to pursue a cause of action through her agent when there is a power of attorney which includes her property rights. This Court previously recognized that but ordered Plaintiff to amend the Complaint to show it was brought pursuant to the authority of the Power of Attorney. Defendants have offered no legal basis to support their suggestion that only a guardian may file and pursue a lawsuit. Such a claim undermines the purpose of the Illinois Power of Attorney Act. The Act allows individuals, and their families, to protect their rights without the need for ongoing court intervention and supervision. In many cases, court guidance and protection of a disabled individual is necessary and of great benefit. But seeking court approval for every issue affecting that individual can be cumbersome and expensive. The Illinois Power of Attorney Act relieves that burden. Since the Power of Attorney in effect for Jerilyn Tanaka includes property rights inclusive of any legal claims (Ex. A; Plaintiff's First Amended Complaint at Law), it is perfectly appropriate to file the Complaint at Law under the authority granted in the Power of Attorney. Defendants have offered no case law to the contrary.

I. DEFENDANTS LACK STANDING TO CHALLENGE THE POWER OF ATTORNEY.

The Defendants lack standing to challenge the Power of Attorney between Jerilyn Tanaka and her sons. The Illinois Power of Attorney Act limits legal challenges to the principal-agent relationship to "interested parties." 755 ILCS 45/2 - 10(a) (referring to the "agency-court relationship." The Act defines the "interested persons" categories:

1. The principal or the agent defined in the power of attorney;
2. A guardian of the person or estate or other fiduciary charged with management of the property;
3. The principal's spouse, parent or dependent;
4. A presumptive heir-at-law of the principal;
5. A named beneficiary of the principal's property;
6. A provider agency as defined in the **Elder Abuse** and Neglect Act;
7. A representative of the Office of the State Long Term Care Ombudsman;
8. A government agency having regulatory authority to protect the welfare of the principal;
9. A principal's caregiver or another person who demonstrates sufficient interest in the principal's welfare.

[755 ILCS 45/2-1 Off](#))

The Defendants do not under any circumstances meet any of the definitions or categories for an “interested person” under the statute. This claim is made for the benefit of the principal. It alleges the Defendants are responsible for damages and seeks to make her “property” whole. Defendants have denied those allegations; therefore, the Defendants' position is contrary and adverse to Ms. Tanaka's interest. Since defendants cannot meet the statutory definition of “interested person,” the Court must decline to hear their challenge against the agency.

II. DEFENDANTS FAIL TO ESTABLISH A FACTUAL BASIS THAT THE POWER OF ATTORNEY IS FORMALLY INSUFFICIENT.

An “interested person” can seek to invalidate a power of attorney. The agency can be attacked based on failure to comply with formalities; lack of capacity; and undue influence. The defendants have alleged lack of capacity in the matter.

The Power of Attorney Act does not specify or define a capacity standard. It does, however, define “incapacitated” alternatively as 1) there has been an adjudication under the Probate Act of disability; or 2) a licensed physician has examined the individual, determined the individual lacks decision making capacity and made a written record of that determination within 90 days of the examination, and that record was delivered to the agent. [755 ILCS 45/2-3\(c-5\)](#).

There has been no adjudication under the Probate Act. And while there are certainly medical records documenting Ms. Tanaka's condition over time, there is no specific record of medical declaration of incapacity before 2010 (Ex. D, Report of treating physician). Plaintiff takes no issue with the report suggesting Jerilyn Tanaka was under legal disability as of the date of that report in July 2010. But the report was prepared subsequent to the power of attorney, and the motions are silent as to the circumstances of the signing of the power of attorney.

Again, even if the Court decides to move past the deficiencies in defendants' motion to dismiss, that is, the lack of standing, they have offered this Court no basis to evaluate the substantive factual argument. Defendants attack the Power of Attorney and assert that Ms. Tanaka was legally incompetent to execute the document. However, Defendants offer no evidentiary support for the motion. They have attached no affidavits of anyone with knowledge of the circumstances. They present the Court with no sworn testimony that in July 2009 Ms. Tanaka did not understand the form. Defendants want this Court to rule as a matter of law that in 2009 Ms. Tanaka lacked capacity to sign the Power of Attorney. The Power of Attorney at issue was witnessed and notarized. (Ex. A) Defendants also should know from the record that the first medical report specifically giving a medical opinion regarding disability was July 2010 (Ex. D). Ms. Tanaka's [anoxic brain injury](#) is a serious condition, but it is a condition with a continuum of symptoms, and a condition that may be progressive in its affect on an individual's functional abilities. While her memory has been affected, she has been able to understand conversations (Ex. C; Deposition of John Tanaka; pp. 42, 47) There is no question that she has difficulties with long and short term memory. However, that is not necessarily equivalent to the ability to understand something in the moment. Defendants have offered the court no guidance as to how it would determine capacity in July 2009.

It should also be noted that Defendants refer to a report from a guardian *ad litem* appointed when the sons considered establishing a guardianship of the person and estate. That report takes no issues with the Power of Attorney. In fact, a petition for guardianship was withdrawn since there was no concern that the agents were not acting in the best interests of Mrs. Tanaka. If there had been such a concern, the Circuit Court of Cook County would certainly have the authority to require a hearing based on any statement of concern by the appointed guardian *ad litem*. Plaintiff's counsel can state that no objection was made to the request to withdraw the petition.

III. DEFENDANTS PROVIDE NO EVIDENTIARY OR LEGAL BASIS THAT THE PRINCIPAL LACKED CAPACITY TO EXECUTE THE POWER OF ATTORNEY AT THE TIME.

The Illinois Power of Attorney Act defines no specific standard for defining the level of incapacity recognized to execute a Power of Attorney. Legal disability is defined in the Illinois Probate Act. [755 ILCS 45/2-7.5\(a\)](#). But that Act requires that a properly qualified and licensed physician issue a written and signed report declaring a determination of incapacity within 90 days of the examination delivered to the agent for guardianship be granted. ([755 ILCS 45/2-7.5\(a\)](#)). Thus, even if we utilize the Probate Act by analogy to the Power of Attorney Act, there is no written report as of July 2009 from a physician stating that Ms. Tanaka was incapacitated and therefore unable to execute the Power of Attorney. Thus, Defendants cannot presume the Power of Attorney is invalid without some factual basis.

As noted before, Defendants' motion is premised on an admission and an assertion that Ms. Tanaka has been under a legal disability since the November 2008 event. A legal disability is defined as preventing an individual from being "fully able to manage his or her person or estate." [5 ILCS 70/1.06](#). The existence of a legal disability does not require formal adjudication. [Clark v. Joe Eyn Han, 272 Ill.App.3d 981](#). If this Court invalidates the Power of Attorney because Plaintiff was under a legal disability and lacked the requisite capacity to execute the document, the Complaint at Law at issue become a nullity. And by Defendants' admission that the legal disability began in November, 2008 and continues to the present moment, the statute of limitations is tolled until such time as the legal disability is removed.

Illinois has also recognized that an individual with a legal disability may still be able to modify a legal document. For example, in [Re Estate of Letsche, 73 Ill App 3d 643, 392 NE2d 612 \(1st Dist. 1979\)](#), a woman executed a will naming two beneficiaries. Subsequently, the woman was adjudicated incompetent and a conservator was appointed. Several years later, the woman changed the will. One of the beneficiaries challenged the will on the grounds of undue influence and incompetence. The appellate court denied the petition and noted that the mere fact that a conservator had been appointed was not conclusive that the individual lacked the requisite understanding for changing her will. In the present matter, the defendants ask this court to presume that she did not understand the power of attorney documents. But as the *Letsche* case shows, even a person declared incompetent may still at times retain the mental capacity to execute a legal document. Since the defendants have provided no testamentary basis that Jerilyn Tanaka could not have understood the document at the time, this court should not make a presumption of lack of capacity.

IV. DEFENDANTS' MOTION MAKES THE COMPLAINT AT LAW A NULLITY.

Defendants' Motions to Dismiss asks this Court to conclude that Jerilyn Tanaka was legally disabled and lacked capacity since November 2008. If the Court grants the motions, it must do so based on that finding. If Jerilyn Tanaka was legally disabled and lacked capacity, the complaint is null and void. Since the individual would be deemed legally disabled, the statute of limitations would be tolled. And a Complaint at Law would be filed once an estate was opened pursuant to formal guardianship.

Plaintiff has proceeded with the Power of Attorney because it is more convenient and less expensive than a formal guardianship. Defendants' motions are undermining the purpose of the Power of Attorney Act which is in part to minimize the burden on family members trying to care for sick and **elderly** relatives.

Dismissal would be a harsh result and result in further delay in getting to the merits of the case.

CONCLUSION

The Complaint at Law at issue is an attempt to protect the property interest of Jerilyn Tanaka. There is no evidence that this matter serves any purpose other than to benefit her. Protection of the principal is the agent's duty under a Power of Attorney. There is no evidence that the agent is not meeting this obligation.

WHEREFORE, Plaintiff requests that these Motions to Dismiss be denied.

O'CONNOR & NAKOS, LTD.

By: <<signature>>

One of Plaintiff's Attorneys

MARTIN J. LUCAS

O'CONNOR & NAKOS, LTD.

120 N. LaSalle Street, 35th Floor

Chicago, IL 60602

312-546-8100

Attorney No.: 6207741

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